No. 82-1832

In The
Supreme Court of the United States
October Term, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION and TOWN OF WASHINGTON,

Petitioners,

v.

CITY OF EAU CLAIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

The Court of Appeals ruled that the City's anticompetitive conduct was exempt from the Sherman Act, relying on its formulation of the *Parker v. Brown* test. The questions presented are:

1. If a state statute permits a city to engage in conduct which, under some circumstances, may be anticompetitive in violation of the Sherman Act, is it proper for the court to assume the state contemplated such anticompetitive conduct and infer that the State condones it?

2. If it is proper under circumstances identified in question one for the court to infer that the State condones certain anticompetitive conduct, is this inference sufficient to meet the "clearly articulated and affirmatively expressed" state policy test defined by this Court?

3. Does the fact that a person engaging in anticompetitive conduct is a municipality eliminate the requirement that the anticompetitive conduct be "actively supervised by the State"?

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This Brief on the Merits is filed on behalf of Petitioners, the Wisconsin townships, Town of Hallie, Town of Seymour, Town of Union and Town of Washington.[1]

[1]The parties named in the caption are the only parties to this litigation.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 700 F.2d 376 (7th Cir. 1983) and included at pages 26-44 of the Joint Appendix (J.A. 26-44). The decision and judgment of the United States District Court for the Western District of Wisconsin are unreported and included at pages 13-23 and 25 of the Joint Appendix (J.A. 13-23, 25).

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1). The Petition for Writ of Certiorari was filed May 11, 1983, within 90 days of the February 17, 1983, Opinion and Judgment of the Court of Appeals for the Seventh Circuit. Certiorari was granted on June 11, 1984.

STATUTES INVOLVED

This case concerns §2 of the Sherman Act, 15 U.S.C. §2 and WIS. STAT. §§66.069(2)(c), 66.076(1), 144.07(1m) and 196.58(5). All Wisconsin statutes are the 1981 compilation. These statutes are reprinted in the Appendix of Statutes.

STATEMENT OF THE CASE

The Towns of Hallie, Seymour, Union and Washington ("Towns") filed a complaint against the City of Eau Claire ("City") alleging that the City violated the Sherman Act by using its monopoly over sewage treatment services to gain monopolies in sewage collection and transportation services. Complaint, J.A. 2-9. The United States District Court for the Western District of Wisconsin granted the City's motion to dismiss for failure to state a claim upon which relief may be granted under Fed.R.Civ. Pro.12(b) (6). Decision and Order of the District Court, J.A. 13-23, 25. The United States Court of Appeals for the Seventh Circuit affirmed, J.A. 26-44; 700 F.2d 376 (7th Cir. 1983). The Towns filed a Petition for Certiorari on May 11, 1983, which was granted on June 11, 1984.

The Towns alleged that the City violated §2 of the Sherman Act, 15 U.S.C. §2. Claims I-IV of the Complaint, J.A. 2-6. The Towns' complaint alleged that the City constructed a regional sewage treatment facility with federal funds. Although this facility is located within the City and is owned and operated by the City, it was designed and intended to serve the geographic region consisting of the City and the Towns. This facility is the only sewage treatment facility in the market available to the Towns and, as a result, the City enjoys a monopoly in the market for sewage treatment services in the geographic market in which the Towns are located.

The sale of sewage services involves three steps. First, the sewage must be collected from the user. Second, it must be transported to a treatment facility. Third, it

must be treated and disposed of at the treatment facility. Each step in the process requires that the next succeeding step of service be available.

The Towns are actual or potential competitors with the City in the market for sewage collection and transportation services in the geographic market in which the Towns are located and in which the City holds a monopoly over sewage treatment services. However, the Towns can sell sewage collection or transportation services only if they can purchase treatment services from someone else.

The City's anticompetitive conduct in violation of the Sherman Act is the monopolization of collection and transportation services in the Towns. The City offers to sell such services, as well as treatment services, to persons located in the Towns but refuses to sell treatment services to the Towns—its potential competitors for the sale of collection and transportation services. By refusing to sell treatment services to the Towns, the City has prevented the Towns from competing with the City in the markets for collection and transportation services. Since the Towns have no means of disposing of the sewage other than the City's facility and since the City will not sell them treatment service, the Towns cannot collect sewage and have no place to which to transport it. The result is the City has monopolized collection and transportation services by its use of its monopoly power in treatment services.

In addition, the Towns alleged a pendent state law claim that the City had assumed a duty to serve the areas constituting the Towns, a duty in the nature of a

public utility and the City was not fulfilling its duty. Claim VI of the Complaint, J.A. 7.[2]

The City filed a motion to dismiss pursuant to Rule 12(b)(6) of the Fed.R.Civ.Pro., J.A. 10-12, arguing that the City's acts were not subject to the Sherman Act under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). In its Decision and Order of April 5, 1982, the District Court agreed with the City and granted the motion to dismiss. J.A. 13-22, 25. A judgment was entered that same date. J.A. 23.

The Towns appealed, J.A. 24, and on February 17, 1983, the Court of Appeals affirmed the District Court's judgment, J.A. 26-44. The Seventh Circuit acknowledged that the *Parker v. Brown* test requires that the City's anticompetitive conduct be authorized by the State pursuant to a clearly articulated and affirmatively expressed State policy to displace competition with regulation or monopoly service. J.A. 33. The Seventh Circuit held WIS. STAT. §§66.069(2)(e) and 144.07(1m) satisfied this requirement, although neither addresses nor expresses a policy that the City provide these services on a monopoly basis.

In reaching this result, the Seventh Circuit held that the State need not express a policy authorizing the City to displace competition in sewage service with monopoly service. Instead, all that is required is that "the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services" because the Court then "can assume that the State contemplated that anticompetitive effects might result from

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[2]The dismissal of Claim V of the Complaint, based on the Federal Water Pollution Control Act, J.A. 6-7, is not pursued on appeal.

conduct pursuant to that authorization" and having made that assumption the Court "can infer that it [the State] condones the anticompetitive effect." J.A. 34. The Seventh Circuit held this sufficient to meet the "clear articulation and affirmative expression" test of *Parker v. Brown*. J.A. 34-37.

The Seventh Circuit acknowledged that *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum*, 445 U.S. 97 (1980), requires "active state supervision" for exemption under the *Parker v. Brown* test. The Seventh Circuit held that this holding in *Midcal* only applies to private parties. The Seventh Circuit held municipalities are immune under *Parker v. Brown* if they meet the clear articulation and affirmative expression standard, even though there is no active state supervision. J.A. 40-44.

The Petition for Certiorari, raising the issue of the legal standard used by the Seventh Circuit, followed.

SUMMARY OF ARGUMENT

I. The District Court dismissed this action on the basis of the pleadings. Fed.R.Civ.Pro. 12(b). Whether the City is entitled to State action immunity as a matter of law must therefore be determined by accepting the allegations of the complaint as true. The complaint alleges the City unlawfully acquired a monopoly in sewage treatment services to monopolize sewage collection and transportation services in the unincorporated areas surrounding the City, and that the City has since used that monopoly power for that purpose. The result is that the City's anticompetitive conduct has eliminated the Towns as potential competitors for provision of sewage collection and transportation services in these unincorporated areas.

II. The sole purpose of the *Parker* exemption is to shield the sovereign States from an unintended intrusion on their sovereignty by the federal antitrust laws. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). As a result, cities are not exempt from the antitrust laws. *Community Communications v. Boulder*, 455 U.S. 40, 50-51 (1982). However, the Court recognized that sovereign States frequently choose to implement their policies through State agencies, municipalities and private persons. Such persons, otherwise subject to the antitrust laws, are exempt only while acting on behalf of the State, at the State's direction, to implement the State's policy. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408-417; *Boulder*, 455 U.S. at 51-56. This exemption is to avoid an indirect impairment of the State's sovereignty and is not to protect the nonsovereigns *per se*.

The objective of any test for exemption must be to distinguish anticompetitive conduct attributable to the sovereign State from other anticompetitive conduct. This depends upon the State's involvement in the conduct and not the public or private nature of the person claiming exemption. Therefore, a single standard for exemption should exist.

The identification of anticompetitive conduct attributable to the State is best accomplished through the first prong of the *Parker* exemption test. Responsibility for the particular anticompetitive conduct is identified most clearly by determining who initiated the policy requiring the anticompetitive conduct and who directed that the policy be implemented. The Seventh Circuit's test as-

sumes the State initiated the policy requiring the anticompetitive conduct in question, without evidence that this is true. It accepts State indifference for the State's direction. The result is that cities are permitted to pursue their own parochial interests, contrary to the antitrust laws, when the State's sovereignty neither requires nor receives protection.

When a nonsovereign is acting as the owner and provider of a service, the proper test requires that a State policy to displace the competition in question be affirmatively and clearly expressed in the State's statutes. Mere State neutrality is insufficient, *Boulder*, 455 U.S. at 55-56, because the State's sovereign policy must conflict with the enforcement of the Sherman Act. If the State is neutral or indifferent, enforcement of the Act will not materially impair the State's policy. Second, the anticompetitive conduct must necessarily follow from the State's clearly articulated policy. Unless this is so, there is no assurance that the anticompetitive conduct is attributable to the State, nor can it be said that restraining this conduct will impair the State's sovereign policy. Any lesser test would call for speculation on the State's involvement in the anticompetitive conduct and would invite the lower federal courts to substitute their judgment of the appropriateness of the particular conduct for that of the State.

III. The Wisconsin statutory scheme for the sale of sewage services, like the home-rule power at issue in *Boulder*, simply delegates decisionmaking authority to local governments. At best, these statutes evidence a State policy of complete neutrality—directing neither monopolization nor competition. These statutes gave the City the opportunity to compete or to engage in anticompetitive

conduct. The decision to engage in the latter was made solely by the City without direction or guidance by the State of Wisconsin. This conduct is not exempt from the Sherman Act.

IV. If the proper test for the first prong of *Parker* exemption is applied, the need for active State supervision is greatly reduced. It would be required only when implementation of the particular activity requires State supervision to assure that the State is the ultimate policymaker. However, if the Seventh Circuit's test is accepted, active State supervision must be required in all cases because it will be the only meaningful nexus between the State and the anticompetitive conduct in question.

V. In this case, Wisconsin's statutes do not provide for nor is there any State supervision of the City's anticompetitive conduct.

The *Parker* exemption does not apply to this case. The dismissal was improper and the case should be remanded for further proceedings on the merits.

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ARGUMENT

I. The Towns' Complaint, Which Is To Be Liberally Construed, States A Cause Of Action Under The Sherman Act Unless The City's Actions Are Exempt Under Parker v. Brown.

This case comes before the Supreme Court on appeal from decisions granting the City's motion to dismiss the Towns' complaint for failure to state a claim upon which relief can be granted. Fed.R.Civ.Pro. 12(b) (6). In such a setting, the Court is to accept as true the material facts

alleged in the complaint. *Hospital Bldg. Co. v. Rex Hospital Trustees,* 425 U.S. 738, 740 (1976). Under the liberal interpretations of complaints required pursuant to the notice pleading of Fed.R.Civ.Pro. 8, a court is not to grant such a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Such a liberal interpretation of the complaint is particularly appropriate in antitrust actions, where "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted sparingly." *Hospital Bldg. Co., supra,* 425 U.S. at 746.

The essence of the Towns' complaint is the City's abuse of its monopoly in the sale of one type of sewage services (treatment) to gain a monopoly in the sale of other sewage services (collection and transportation). The City has a monopoly in the sale of sewage treatment services in the market available to the Towns. The Towns are potential competitors with the City in the sale of sewage collection and transportation services in that same market. Without the availability of sewage treatment services, the Towns are foreclosed from competing with the City for the sale of sewage collection and transportation services. Thus, the City is using its monopoly in one market to foreclose competition in other markets.[3] The City's approach can be simply summarized: "We will sell our monopoly sewage treatment services in the Towns," the City is saying, "but not to you, Towns, our potential competitors for the sale of sewage collection and transportation services. We will only sell our monopoly services to those who cannot compete with us for other services."

[3]The allegations of the complaint fit within the so-called "bottleneck" or "essential facilities" doctrine under antitrust law. *E.g., MCI Communications Corp. v. American Telephone & Telegraph Co.,* 708 F.2d 1081, 1132-33 (7th Cir.); *cert. denied,* — U.S. —, 104 S.Ct. 234 (1983).

It is clear that, absent the exemption afforded to States under *Parker v. Brown,* 317 U.S. 341 (1943), the City's actions violate the Sherman Act. The illegality of such conduct is unchallenged by the City and is well recognized in the federal decisions.

> . . . [E]ven a *lawful monopolist* may be subject to antitrust restraints when it seeks to *extend or exploit its monopoly* in a manner not contemplated by its authorization. Cf. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 377-382. (Emphasis added.)

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 417 (1978).

Indeed, the possession of monopoly power in one market may prohibit what otherwise would have been lawful conduct in other markets.

> There are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 [of the Sherman Act] if done by a monopolist.

Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 711-12 (7th Cir. 1977), *cert. den.* 439 U.S. 822 (1978). Therefore, the use of an even lawfully acquired monopoly to beget further monopolies or to create other anticompetitive restraints is unlawful. In this case, the Towns do not concede that the City's monopoly in treatment services was lawfully acquired because the Complaint alleges that the City acquired this monopoly with an intent of abusing

that power, itself a violation of the Sherman Act. Complaint, paragraph 15; J.A. 5. See *Times-Picayune Pub. Co. v. U.S.*, 345 US. 594, 622-23 (1953); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3rd Cir. 1975).

Anticompetitive conduct which forecloses competition is just as onerous in the eyes of the antitrust laws as anticompetitive conduct which eliminates existing competition. *U.S. v. Griffith*, 334 U.S. 100, 107 (1948); *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973).

The Towns' complaint alleges that the City is using its monopoly power in sewage treatment services to monopolize, *i.e.*, prevent the Towns from competing with the City in the sale of sewage collection and transportation services within the Towns. This conduct clearly violates the antitrust laws unless exempted under *Parker v. Brown*.

II. The First Prong Of The Test For Parker Exemption Requires: (1) That The State As Sovereign Has Clearly Articulated And Affirmatively Expressed Its Own Policy To Displace The Competition Restrained By The City's Anticompetitive Conduct; And (2) That, If Such A State Policy Exists, The State Has Directed Or Authorized The City To Implement That Policy With Anticompetitive Conduct Which Necessarily Follows From The State's Clearly Articulated Policy.

The *Parker* exemption recognizes the fact that Congress did not intend to limit the State's sovereignty by the antitrust laws and is designed to shield the States from an unintended federal intrusion on their sovereignty. *Parker*, 317 U.S. at 350-351. The Court has developed a two-

prong test for *Parker* exemption requiring: (1) that the State as sovereign has "clearly articulated and affirmatively expressed" its policy to displace competition with regulation, including the particular anticompetitive conduct in question; and (2) that the State's policy is "actively supervised" by the State itself. *City of Lafayette v. Louisiana Power & Light Company*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.); *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

In *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), J.A. 26-44, the Seventh Circuit fashioned a new test which, if accepted, eliminates the requirement of active State supervision at the same time it wholly eviscerates the concepts of clear articulation and affirmative expression this Court's precedents require. It assumes a State policy to displace competition rather than requiring that the State express such a policy. J.A. 33-34. It accepts as satisfactory State indifference, rather than requiring affirmative State action. J.A. 35-36. The result of this test is that municipalities otherwise subject to the antitrust laws are left free to make economic choices contrary to those laws guided solely by their parochial interests. The Seventh Circuit's test is the antithesis of this Court's test because it casts aside the fundamental economic policy of free competition created by Congress without first determining that the State's sovereignty actually requires or is afforded protection by the exemption.

Since the goal of the *Parker* exemption is to protect the sovereign States from the restraints of the antitrust laws, the test to determine exemption must isolate anticompetitive activity attributable to the sovereign State

from other anticompetitive conduct. This is best accomplished through the first prong of the *Parker* exemption test. First, the State must clearly and affirmatively adopt a policy to displace competition. This is necessary because this State policy creates the conflict between the State's sovereignty and the antitrust laws; this conflict, in turn, generates the need for the State protection afforded by the exemption. Second, the particular anticompetitive conduct involved must necessarily follow from the State's directive to implement that policy. This assures the anticompetitive conduct is attributable to the State and is not the act of another. This test would create a single standard applicable to any nonsovereign, public or private, claiming the benefit of the exemption and, at the same time, would greatly reduce the need for the active State supervision prong of the test. This test would assure that the fundamental policy of free competition is displaced only when protection of the State's sovereignty requires it.

A. A nonsovereign person may benefit from the Parker exemption only to the extent necessary to protect the State's sovereignty.

As the Magna Carta of free enterprise, the Sherman Act is a carefully studied attempt to bring within the Act every person whose activities might restrain or monopolize commerce among the States. *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 553 (1944); *Lafayette*, 435 U.S. at 398. Accordingly, there is a heavy presumption against implicit exemptions from the Sherman Act. *Lafayette*, 435 U.S. at 398-399; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). The Court has already decided that public corporations, including local

government, are subject to the Sherman Act. *Lafayette*, 435 U.S. at 394-408; *Community Communications Co. v. Boulder*, 455 U.S. 40, 50-51 (1982). Therefore, public persons are no more exempt from the Act than are private persons.[4]

An exception to this rule is known as the *Parker* exemption.[5] This exemption results from the interaction of the already mentioned heavy presumption against implicit exemptions from the Sherman Act with the competing policy that an unexpressed purpose to nullify a State's sovereign power is not lightly to be attributed to Congress. *Parker v. Brown*, 317 U.S. at 351; *Lafayette*, 435 U.S. at 400. As a result:

> [r]elying on principles of federalism and state sovereignty, the Court declined to construe the Sherman Act as prohibiting the anticompetitive actions of a State acting through its legislature. . . . [*Hoover v. Ronwin*, — U.S. —, 52 U.S.L.W. 4535, 4538 (May 14, 1984).]

The goal of the *Parker* exemption is to protect the State's sovereignty from an unintended federal limitation, and the sole entities sought to be protected are the sovereign States.

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[4]The same may not be true with respect to remedies available against cities under the Sherman Act or with the determination of whether a particular activity is anticompetitive. *Lafayette*, 435 U.S. at 401-02 and 417 n. 48.

[5]Other exceptions not applicable here are: (1) when Congress subsequently enacts a regulatory program repugnant to the Sherman Act, *United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 350-351 (1973); and (2) when concerted efforts are made to influence lawmakers to enact legislation, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

This singular purpose is evidenced by limitations the Court has placed on the exemption. Since protection of the State's sovereignty is the end sought, a State itself is shielded from liability solely when acting as a sovereign. *Parker*, 317 U.S. at 352; *Boulder*, 455 U.S. at 48-49; *Ronwin*, — U.S. —, 52 U.S.L.W. at 4539. Likewise, just as a State cannot confer its sovereignty on others, a State cannot confer its *Parker* exemption on others by authorizing them to violate the Sherman Act or by declaring their conduct lawful.[6] However, this does not mean that anticompetitive programs created by a State acting as a sovereign may not be implemented by the State through other public or private persons.

Under the *Parker* exemption, persons otherwise subject to the Sherman Act are exempted from the Act while acting on behalf of the State, at the State's direction or authorization, to carry out the State's policy to displace competition with regulation or monopoly service. *Lafayette*, 435 U.S. at 408-17; *Boulder*, 455 U.S. at 52-56. This is

> . . . simply a recognition that a state may frequently choose to effect its policies through the instrumentality of its cities and towns. [*Boulder*, 455 U.S. at 51.]

The same is true with respect to State agencies and private persons. *Parker*, 317 U.S. at 352; *Cantor v. Detroit*

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[6]True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47. . . . [*Parker*, 317 U.S. at 351.]

See also, Lafayette, 435 U.S. at 415 fn. 45; and *Boulder*, 455 U.S. at 55-56.

Edison Company, 428 U.S. 579, 592-93 (1976); *Goldfarb*, 421 U.S. at 791; and *Midcal*, 455 U.S. at 104.

However, it must be remembered that any exemption conferred on nonsovereign persons is not for the purpose of protecting the nonsovereign *per se*. Congress intended that these nonsovereigns be subject to the Act. *Lafayette*, 435 U.S. at 394-408; *Boulder*, 455 U.S. at 50-51. Rather, their exemption is incidental to protecting the State's sovereignty, which is the sole basis for the *Parker* exemption.

B. Unless the State as sovereign has adopted a policy to displace the competition restrained by the City's anticompetitive conduct, there is no conflict between the State's sovereignty and the Sherman Act requiring protection of the State's interests.

Since the policy underlying the *Parker* exemption is to protect the State's sovereignty from an unintended intrusion by enforcement of the Sherman Act, a conflict between an exercise of the State's sovereignty and the Sherman Act must exist before the exemption is applicable. Whether such a conflict exists is unrelated to the nature of the nonsovereign instrument the State may select to implement its policy.[7] The only relevance the nonsovereign has to this issue is that its anticompetitive *activity* defines the area of potential conflict between the exercise of the State's sovereign power and the Sherman Act.

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[7]Logic dictates that neither: (1) the clarity of the State's policy to displace competition; (2) the State's interest in seeing that policy protected; nor (3) the impairment of the State's sovereignty, if its policy is not protected from operation of the Sherman Act, depend upon the nature of the person purporting to implement the State's policy.

The State's sovereignty is not impaired by enforcement of the Sherman Act unless: (1) the State has exercised that sovereignty; and (2) this exercise of sovereignty conflicts with and cannot be carried out if the provisions of the Sherman Act are enforced. The policy of the antitrust laws is to assure free competition. Therefore, unless the State as sovereign adopts a policy to displace that competition, no material conflict exists between the State's sovereignty and the antitrust laws justifying exemption of the nonsovereign's anticompetitive conduct.

The need for this conflict was discussed most fully in *Cantor v. Detroit Edison Company*, 428 U.S. 579 (1976).[8] Although the utility was subject to State regulation and could not adopt the program without State agency approval, which it had, the Court held that the utility was not exempt from the Sherman Act.

> The Court reasoned that the
>
> mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. [*Cantor*, 428 U.S. at 596.]

For exemption it first must be determined that

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[8]*Cantor* was decided before *Lafayette* and therefore did not discuss exemption in the context of public entities being subject to the Sherman Act. In light of *Lafayette* and *Boulder*, the reasoning of *Cantor* applies to public entities as well as private ones.

> . . . exemption was necessary in order to make the regulatory Act work, "and even then only to the minimum extent necessary." [*Cantor*, 428 U.S. at 597.]

When the State's policy was compared to that of the antitrust laws the Court found that the State had not created a policy to displace competition in the market in question. *Cantor*, 428 U.S. at 592-598. Therefore, no exemption was necessary because enforcing the antitrust laws left the State's interest in regulating utilities almost entirely unimpaired. *Cantor*, 428 U.S. at 598.

The need for this conflict is reflected in this Court's consistent identification of the requisite State policy as a policy to "displace competition with regulation or monopoly service." *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *Lafayette*, 435 U.S. at 413; *Midcal*, 445 U.S. at 105; and *Boulder*, 455 U.S. at 51.[9]

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[9]In each case in which exemption was granted, the State clearly and affirmatively had adopted a policy to displace the competition in question. In *Parker* it was the command of the State which displaced competition among the growers. *Parker*, 317 U.S. at 346. In *Bates*, the restraint was the affirmative command of the sovereign state. *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-360 (1977). In *Orrin W. Fox Co.*, the sovereign state:

> clearly articulated and affirmatively expressed [a system of regulation] designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. [*Orrin W. Fox Co.*, 439 U.S. at 109.]

In *Midcal*, although the second prong of the *Parker* exemption was not met, the first was because the State's "legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." *Midcal*, 455 U.S. at 105. In each case in which exemption was denied, the State had acted in some

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Most recently it was described as a policy "to replace competition with regulation." *Ronwin*, — U.S. —, 52 U.S.L.W. at 4538. This description has been consistent regardless of whether the nonsovereign was a State agency, municipality or private person. This is so because it is the *State's* policy to *displace competition* which creates the conflict between the antitrust laws and the State's sovereignty which the *Parker* exemption is intended to resolve.

The Seventh Circuit's test fails to make any meaningful determination of whether the State has decided to replace competition with regulation. In fact, the Seventh Circuit refused to focus on this issue. J.A. 33-34. Instead, the Seventh Circuit focused on a delegation of power to the City, assumed the State has considered the displacement of competition and then imputes the City's policy decision to displace competition to the State. J.A. 34-35, 37-40. This test is erroneous because it assumes the very thing it purports to determine.

The State's policy must be determined by what the State as sovereign has said, not by what the City has done. Otherwise, the State's policy is bounded only by the limits of the cumulative imagination of its cities. In reality, the Seventh Circuit's test determines whether the City has

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manner in the area in question but had not established a policy to displace the competition in question. In *Goldfarb*, the State as sovereign (in this case its Supreme Court) had directed the State Bar to adopt rules as a State agency but had not created a policy to displace price competition among attorneys with binding price fixing. *Goldfarb*, 421 U.S. at 789, 790. In *Boulder*, it was assumed the State had a policy that cities regulate cable television within the city boundaries but there was insufficient evidence to find that the State had established a policy that competition be displaced in that market. *Boulder*, 455 U.S. at 54-57. In *Lafayette*, the case was remanded to see if such a State policy existed. *Lafayette*, 435 U.S. at 413-17.

adopted a policy to displace competition, not whether the State has decided to do so. This is the antithesis of the purposes of the *Parker* exemption.[10]

The threshold inquiry must be whether the State has decided to displace the competition in question with regulation or monopoly service. When the sovereign State has acted through its legislature, this State policy must be found in the State's statutes. Unless the State has "clearly articulated and affirmatively expressed" this policy, there is no evidence that enforcement of the Sherman Act will materially interfere with the State's policies. In that event, no further inquiry is necessary because no basis for applying the *Parker* exemption exists.

C. A State which "condones" its municipalities' anticompetitive conduct has not clearly articulated and affirmatively expressed a policy to displace competition.

When the State's policy is neutral regarding the displacement of competition, this Court has held that:

> To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws, *see, supra*, at 403-408, without furthering the policy underlying at the Parker "exemption". [*Lafayette*, 435 U.S. at 414-415 (plurality opinion).]

Therefore, when State policy is neutral, the State's municipalities must comply with the Sherman Act. *Lafayette*,

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[10]The *Parker* doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer State regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the nations free market goals. [*Lafayette*, 435 U.S. at 415-416 (plurality opinion).]

435 U.S. at 414-415 and 415 fn. 45; *Boulder*, 455 U.S. at 55-56.

The Seventh Circuit's test is the embodiment of the concept of neutrality rejected by this Court. First, the Seventh Circuit assumes that the State legislature has affirmatively considered the displacement of competition because a city has found a way to use a delegated power in an anticompetitive fashion. J.A. 34-35. It is just as likely that the legislature delegated the particular authority without considering the possibility that a municipality would impose a restraint of the type engaged in. Unless the words or history of the State statutes clearly indicate the legislature actually had contemplated the displacement of competition, there is no basis for finding that the State has "affirmatively" addressed the issue.

Having assumed the legislature addressed the displacement of competition, the Seventh Circuit infers the State "condones" an anticompetitive use of the delegated power and accepts this as sufficient for exemption. J.A. 35-36. Using this analysis, if the delegated power is also capable of being used in a competitive manner, the Court must also infer the State "condones" the competitive use of the delegated power. If this is so, the State's position is one of precise neutrality.[11] If the State merely "condones" the policy decisions of others, it cannot be said that the State itself has made the policy decision to displace competition. Just the opposite is true. The State has decided not to make this decision.

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[11]Stated another way, the legislature may have considered the restraint and neither wished to impose it as State policy nor wished to prohibit it.

These matters were directly addressed in *Boulder*. In *Boulder* the Court assumed the State of Colorado had delegated the authority to Boulder to enact the moratorium ordinance under challenge. *Boulder*, 455 U.S. at 53, fn. 16. Boulder argued that because the State granted it the power to enact this ordinance, the State "contemplated" Boulder's enactment of an anticompetitive program. *Boulder*, 455 U.S. at 54-55.[12] The Court rejected this argument, finding Colorado's policy neutral on the subject.

> But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*" since the term "granted" necessarily implies an affirmative addressing of the subject by the State. [*Boulder*, 455 U.S. at 55.]

The question is whether the State has adopted a policy to displace the competition in question. This must be determined from the State's legislative declarations. If the State has not clearly articulated and affirmatively expressed its own policy to displace competition, enforcement of the Sherman Act does not impair the State's sovereignty.

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[12]*Boulder* also argued that it should be inferred from the authority given Boulder to regulate cable television that the legislature "contemplated" the kind of action complained of. *Boulder*, 455 U.S. at 55.

D. If the requisite State policy exists, the City must also establish that the State has selected the City to implement that policy and that the particular anticompetitive conduct in question necessarily follows from the State's clearly articulated policy.

It is not enough to establish that the State has a policy to displace competition. To be exempt, the City must also establish that the State has directed the City to implement that policy with the particular anticompetitive conduct in question.

> . . . [W]hen the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws. [*Lafayette*, 435 U.S. at 416; *Boulder*, 455 U.S. at 57.][13]

The need for State direction in this regard does not appear to be in dispute. It is the nature and clarity of the direction which is disputed. The precise question presented is: What State direction is necessary for exemption when a municipality is acting as an owner and provider of a service?[14]

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[13]*Lafayette* acknowledged that even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization, *Lafayette*, 435 U.S. at 417, and recognized that it would not hinder State governmental programs to require cities authorized to provide services on a monopoly basis to refrain from predatory conduct not itself directed by the State. *Lafayette*, 435 U.S. at 405, fn. 31.

[14]In this case, the City is not legislatively regulating local economic or social matters as was the case in *Boulder*. Rather, as in *Lafayette*, the City is acting as an owner and provider of services. For this reason, many of the concerns raised by the dissent in *Boulder*, 455 U.S. at 60-71, need not be addressed here.

At various times, it is said the anticompetitive activity must be "compelled", "directed", "authorized", and "contemplated" by the sovereign State. *Goldfarb*, 421 U.S. at 791; *Lafayette*, 435 U.S. at 416; *Boulder*, 455 U.S. 57. When viewed with the objective of the *Parker* exemption in mind, this language may be reconciled into a single test. Since the objective of the *Parker* exemption is to determine whether the State's sovereignty will be impaired if the particular anticompetitive activity is barred by enforcement of the antitrust laws, the test for exemption should not depend upon the public or private nature of the entity claiming exemption.[15] The Court has already determined that the interests of public entities are no more likely to comport with the policy of the antitrust laws than are the interests of private entities. *Lafayette*, 435 U.S. at 403.

The Court has not laid out separate tests. In *Goldfarb*, 421 U.S. at 791, the Court treated the State agency and the private entity the same. It was not enough that the anticompetitive conduct was "prompted" by State action. The Court held that the anticompetitive conduct,

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[15]This is best shown by the anomaly resulting from separate tests for public and private entities. Assume a State has decided to displace competition in the electric utility market and has given the same mandate to municipal and private electric utilities to engage in certain anticompetitive conduct to implement that policy. If separate tests are applicable, although the State's mandate is identical, municipal utilities could be exempt while private utilities are not. Is the State's policy impaired any less because private utilities are subject to the antitrust laws rather than the municipal utilities? Obviously not. The disruption of State policy depends upon the need for the particular anticompetitive conduct to implement the State's policy, not upon the nature of the entity carrying it out.

". . . must be compelled by direction of the State acting as a sovereign." *Goldfarb*, 421 U.S. at 791. In *Lafayette*, the plurality rejected attempts to distinguish *Goldfarb* and relied on *Goldfarb* in reaching its conclusions. *Lafayette*, 435 U.S. at 411, fn. 41, and 411-12. *Midcal*, which involved private entities, cited and adopted the test described in *Lafayette*. *Midcal*, 445 U.S. at 105. In *Boulder*, the Court applied the test defined in *Lafayette* and adopted *Orrin W. Fox Co.* and *Midcal*. *Boulder*, 455 U.S. at 54. This Court has applied the same test to private and public entities.

In *Lafayette*, the Fifth Circuit's test for determining the adequacy of the State's mandate was accepted. *Lafayette*, 435 U.S. at 415. The Fifth Circuit said:

> In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity, to operate in a particular area that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislative grant of power and the subordinate entities' asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. [*Lafayette*, 435 U.S. at 393-394.]

Therefore, the test is a search for evidence that the State has determined that the particular anticompetitive conduct is necessary to implement the State's program.

In this regard, State neutrality regarding the particular anticompetitive conduct is insufficient for *Parker* exemption. *Boulder*, 455 U.S. at 55. As the plurality stated in *Lafayette*, 435 U.S. at 414:

> When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference rather than that of the State. Therefore, in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to "the state['s] command," or to be restraints that "the state . . . as sovereign" imposed. 317 U.S. at 352. The most that could be said is that state policy may be neutral.

If the State merely "condones" a particular anticompetitive conduct, the State has not decided the conduct is necessary to its program or policy. In such cases, the State has left each city free to make this policy decision on its own. When this is true, barring the anticompetitive conduct interferes with the city's policy. This is not sufficient for *Parker* exemption because the State's policy is not impaired by enforcement of the Sherman Act.

The best evidence that the State has contemplated and decided the City should engage in a particular anticompetitive activity, *i.e.*, express statutory language authorizing the specific conduct, is not required. On the other hand, State neutrality regarding the particular anticompetitive conduct is insufficient for exemption. The question then is where between these two points is the line to be drawn.

The proper test is whether the particular anticompetitive conduct of the city "necessarily follows" from the State's clear, affirmative declaration of State policy. This is the test applied by the Ninth Circuit. *Parks v.*

Watson, 716 F.2d 646, 663 (9th Cir. 1983); *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984).[16] This test forms the basis for applying a single test to both private and public nonsovereigns seeking the benefit of the exemption. It balances the need to protect the State's sovereignty with the heavy presumption against implicit exemptions from the Sherman Act. While it would not require the best evidence of State responsibility for the anticompetitive conduct in question, it does give reasonable assurance that the State actually has contemplated the anticompetitive effects of such conduct and has deemed them necessary to implement the State's policy. At the same time, this test would guard against mischief by governmental subdivisions (or private entities) pursuing their own parochial interests.

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[16]The correct test, articulated in *Parks v. Watson*, should be adopted by this Court to make certain the policy of *Parker* is carried out. The lower federal courts have adopted conflicting tests, some of which do not comport with the purposes of the *Parker* exemption. *See Hallie, supra; Parks v. Watson, supra; Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984) (following *Parks v. Watson*); *City of North Olmstead v. Greater Cleveland Reg. Tran.*, 722 F.2d 1284 (6th Cir. 1983) (action "contemplated" by legislature); *Cen. Iowa Refuse Sys. v. Des Moines Metro. Sol. Waste*, 715 F.2d 419 (8th Cir. 1983) (*Parker* exemption applied when legislature gave a "range of options"); *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *Petition for Cert. filed*, 52 U.S.L.W. 3039 (Aug. 9, 1983) (legislature "affirmatively addressed" competition); *Pueblo Aircraft Service v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 762 (1983) (exemption applied when legislature considered action a "governmental function"); *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981) (absent specific authorization, municipality must demonstrate by "convincing reasoning" that the restraint is necessary to a State policy); *Vickery Manor Service v. Village of Mundelein*, 575 F.Supp. 996 (N.D. Ill. 1983) (attempt to harmonize decisions).

It is difficult to conceive of a meaningful lesser test. Any lesser test would call for speculation on whether the State legislature might have contemplated the conduct and might have deemed it necessary to implement State policy. This is an invitation to the lower federal courts to substitute their judgment of the appropriateness of the particular conduct for that of the State. Just as important, how can it be said that the State's sovereign interests will be impaired by enforcement of the Sherman Act, unless there is concrete evidence the State deems this conduct necessary to its policy or program? The mere possibility of such an impairment is not enough to justify

> . . . the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws . . . [*Boulder*, 455 U.S. at 51.]

III. The State Of Wisconsin Has Not Clearly Articulated And Affirmatively Expressed A Policy To Displace The Competition in Question Nor Directed The City To Engage In The Particular Anticompetitive Conduct Involved. At Best, Wisconsin's Policy Is One Of Precise Neutrality.

The Towns have alleged that the City is monopolizing the market for sewage collection and transportation services in the geographic market surrounding the City in violation of §2 of the Sherman Act. The City has done so by acquiring its monopoly in sewage treatment services with an intent to abuse that power, and after acquiring that power, abusing it to monopolize sewage collection and transportation services in the unincorporated areas surrounding the City. The City's anticompetitive conduct has eliminated the competition and potential competition between the Towns and the City for sewage collection and transportation services in this unincorporated area.

The Seventh Circuit, relying on WIS. STAT. §66.069(2)(c) and §144.07(1m), determined that the City's conduct was exempt from the Sherman Act. In doing so, the Seventh Circuit expressly avoided determining whether these statutes evidenced a Wisconsin policy to displace the competition between the Towns and the City. J.A. 33-34. This was necessary because these statutes do not evidence such a State policy. Nor has the State of Wisconsin directed the City to use any delegated power it has to monopolize competition in sewer collection and transportation services in unincorporated areas. Wisconsin's policy is one of precise neutrality. The decision to monopolize these services in the unincorporated areas was made solely by the City to serve the City's interests without any guidance or direction from the State whatsoever. As in *Boulder* 455 U.S. at 55:

> [W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado [Wisconsin]. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City. (Parenthetical added.)

The City is not entitled to the *Parker* exemption.

A. The Wisconsin Statutes create the very competition restrained by the City's anticompetitive conduct in a scheme which leaves policy decisions to local units of government.

The general Wisconsin statute authorizing municipalities to operate and sell sewer services is WIS. STAT. §66.076, which provides in relevant part:

> (1) In addition to all other methods provided by law *any municipality* may construct, acquire or lease, extend or improve any plant and equipment *within or without its corporate limits* for the collection, transportation, storage, treatment and disposal of sewage, including the lateral, main and interceptor sewers necessary in connection therewith, and any town, village or city may arrange for such service to be furnished by a metropolitan sewage district or joint sewage system. . . . (Emphasis added).
>
> (1m) In this section 'municipality' means any town, village, city or metropolitan sewage district. . . .

The Wisconsin Statutes create the potential competition between the City and Towns for the provision of sewage transportation and collection services. Both the Towns and City may provide such services in unincorporated areas.

The entire statutory scheme is in accord with §66.076(1) and reflects a state policy to leave questions of municipal sale of sewer services in general — and competition in particular — to the local municipalities.[17]

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[17]The autonomy granted in municipal sales of sewer services is in stark contrast to municipal sales of electric and water services. The State of Wisconsin has established a state policy and regulatory scheme applying to most utility services, reflected in WIS. STAT. Chapter 196. This chapter establishes the Public Service Commission of Wisconsin (PSCW) and grants it broad jurisdiction and powers. WIS. STAT. § 196.02(1). However, the PSCW's jurisdiction over the sale of municipal sewer services is very limited. While some municipal utilities are included within the definition of "public utility" under the statute, municipal sewer services are specifically absent. WIS. STAT. § 196.01(1). The inclusion by Wisconsin of most municipal utility services is unusual. 1 A.J. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION, at 26 and note 6 (1969).

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The formation of town, village and city utilities to provide sewer services provides that policy decisions are to be made at the local level.[18] The price charged for these services is normally determined by the provider without regulation by the State. WIS. STAT.§66.069 (1)(a); §196.01(1). Part and parcel of this scheme is the local providers' autonomy to decide to whom it will sell.[19] Rather than prohibiting the sale of such services between providers, the Wisconsin statutes specifically provide for it. WIS. STAT. §66.30(2) reads in relevant part:

> In addition to the provisions of any other statutes specifically authorizing cooperation between mu-

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The only way the PSCW obtains jurisdiction over some sew questions is if a complaint is filed with the PSCW, WIS. STAT. § 66.076(9), or where a town, village or city of the fourth class combines its sewer and water utility. WIS. STAT. § 66.077 (2). Even then, the PSCW does not have jurisdiction over the extension of service at issue here. See note *21; infra*.

[18]In addition to § 66.076, see, e.g., WIS. STAT. §§ 66.30-60.316, authorizing sewage services through the formation of town sanitary districts; WIS. STAT. §§ 61.39 and 62.18, further authorizing villages and cities to operate sewers; and WIS. STAT. §§ 66.20-66.26, authorizing the formation of metropolitan sewerage districts

[19]WIS. STAT. §§ 62.18 and 66.069(2) (c), relied on by the Seventh Circuit Court of Appeals, do give municipalities the decisionmaking power to limit their service area. As set forth more fully herein, such statutes do not reach the City's anticompetitive conduct in this case for two reasons. First, the Legislature has expressed neutrality on whether the City is to utilize the powers given—they "may" decide to limit their service area. Secondly, the Legislature has expressed no position on the specific anticompetitive actions of the City in this case: the City is willing to sell sewage treatment services in the areas of the Towns, but only to persons who cannot compete with the City in the sale of collection and transportation services.

> nicipalities, unless such statute specifically exclude action under this section, any municipality may contract with other municipalities, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law. . . . This section shall be interpreted liberally in favor of cooperative action between municipalities.

In the context of the entire statutory scheme, the State is completely neutral on whether the City should or should not sell sewage treatment services to the Towns. The statutes evidence no state policy whatsoever that the City monopolize service in unincorporated areas. Rather the statutes create a framework within which competition between cities, towns and villages is likely to occur. The statutes provide a mechanism for cooperation and pro-competitive contracts among these competitors. But the State leaves all policy decisions regarding competition to the local providers. Any decision to monopolize was made by the City without direction or guidance by the State.[20]

[20]The statutory scheme of Wisconsin reflected herein is analogous to that considered in *Boulder*. Wisconsin, like Colorado, has "home rule" powers for its cities. In Wisconsin, these "home rule" powers spring from two sources: WIS. CONST. ART. XI, § 3, and WIS. STAT. § 62.11(5) the so-called "statutory home rule" authority. For an excellent analysis of Wisconsin's home rule powers, see Comment, *Conflicts Between State Statute and Local Ordinance in Wisconsin*, 1975 WIS. L. REV. 840, approved by the Wisconsin Supreme Court in *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis.2d 518, 534, 271 N.W.2d 69 (1978). Under the analysis of Wisconsin's home rule authority, cities are now held to have the authority to take all acts which the Legislature could authorize them to take, unless specifically withdrawn by statute or constitution. *Id.*, 85 Wis.2d at 532-33; *Wis. Assoc. of Food Dealers v. City of Madison*, 97 Wis.2d 426, 432, 293 N.W.2d 540 (1980). Thus, to the extent statutes discussed herein contain authority which

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B. The statutes relied on by the Seventh Circuit do not evidence a regulatory scheme to displace competition with state regulation. Quite the contrary, these statutes establish the State has withdrawn from policymaking in these areas and left these decisions to local providers.

The Seventh Circuit has not found State policy by examining a statutory scheme of regulation. Instead, it has selected several statutes and lifted them out of the context of the State's statutory scheme to justify its conclusion. The statutes relied upon do not even relate to each other. In fact, WIS. STAT. § 144.07(1m), has no application to the facts at hand. This random perusal of the statutes is not what was intended for *Parker* exemption. The search should be for a scheme or system of State regulation to displace competition.

(1) WIS. STAT. § 66.069(2) (c), does not evidence a state policy to replace competition with monopoly service by the City or direct the City to monopolize such service in unincorporated areas. At best this statute is neutral, leaving the decisionmaking power to the City.

WIS. STAT. §66.069(2)(c) evidences no state policy or direction to displace competition. This subsection reads as follows:

> Notwithstanding s. 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be

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the City might have under its home rule powers, the statutes are merely reiterations of the fact that Wisconsin grants broad autonomy to its municipalities.

> provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

The Seventh Circuit Court of Appeals did not find that this statute authorized the anticompetitive conduct of the City. Rather, the Seventh Circuit found that the statute authorized Eau Claire to act in a certain area and that anticompetitive results might flow from such action. The unstated but obvious corollary to the Seventh Circuit's reading of the statute is that such anticompetitive results *might not* flow from the City's action. Nothing in this statute tells the City how to delineate the area it will serve. The inescapable conclusion is that the decision to use this delegated authority in an anticompetitive fashion is made by the City, not the State. Just as in *Boulder*, the City can pursue its course of anticompetitive conduct pursuant to §66.069(2)(c), while other Cities can pursue free-market competition and both city policies are equally "contemplated" and "comprehended" within the powers granted by the State. *Boulder* 455 U.S. at 56. Acceptance of such a proposition:

> would wholly eviscerate the concepts of "clear articulation and affirmative expression". . . . *Boulder* 455 U.S. at 56.

In fact, WIS. STAT. §66.069(2)(c) does not deal with the City's anticompetitive conduct at all. The manifest purpose of WIS. STAT. §66.069(2)(c) is to deprive the Public Service Commission of Wisconsin (PSCW) of authority to regulate extensions of service to unincorporated areas. Absent the statute, the PSCW would decide

such questions of service extension under WIS. STAT. §196.58(5).[21] The statute addresses a jurisdictional issue between the PSCW and local bodies, not an issue of competition or lack thereof.[22] WIS. STAT. §66.069(2)(e)

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[21]WIS. STAT. § 196.58(5) is set forth in the Appendix of Statutes. Because the PSCW does not, as an initial proposition, have jurisdiction over sewage services, note 17, *supra*, § 66.069 (2) (c) initially operates to deprive the PSCW only of extension jurisdiction regarding municipal water and electric utilities. To the extent the PSCW may take jurisdiction over sewage service questions as allowed by statute, § 66.069(2) (c) would then operate to deprive it of jurisdiction over issues of extension of sewer services to unincorporated areas.

[22]This purpose is evident from the intertwined history of WIS. STAT. §§ 66.069(2) (c) and 196.58(5). Prior to the enactment of § 196.58(5), the Wisconsin Supreme Court held that municipalities had original jurisdiction over extensions of service. *State v. Washburn Water Works Company*, 182 Wis. 287, 290 et seq., 196 N.W. 537 (1923). The legislative response was the enactment of present § 196.58(5) by 1931 WIS. LAWS, C. 183. See *Milwaukee v. Public Service Commission*, 252 Wis. 358, 361-62, 31 N.W.2d 571 (1948). Subsequent decisions make it clear that the issue addressed by the Legislature was not competition, but jurisdiction over the public utility law concept of a service area. *Milwaukee v. Public Service Commission*, 268 Wis. 116, 120, 66 N.W.2d 716 (1954); *Milwaukee v. Public Service Commission*, 11 Wis.2d 111, 104 N.W.2d 167 (1960).

In originally enacting present § 66.069(2) (c), the Wisconsin Legislature did not modify its position that the PSCW, not the cities, had jurisdiction to determine service area. 1951 WIS. LAWS, C. 560, § 11, enacted sub. (2) (c) to provide: "Each village or city *shall by ordinance* fix the limits of such service in unincorporated areas." (Emphasis added). The explanatory note to this provision of the law when introduced (1951 Wis. Senate Bill 351) states that it was enacted "to provide a procedural omission." The Legislature did not address competition, but told municipalities the procedure by which they were to provide extra-territorial service. The PSCW continued to exercise jurisdiction over the concept of a service area. *Mil-*

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simply addresses the public utility concept of a service area in unincorporated towns and determines that, on this issue too, the State adopts a position of neutrality. To the extent §66.069(2)(c) can be said to be a "clear articulation and affirmative expression of any state policy," it is emphatically not a policy to displace competition. Rather, it is an expression of Wisconsin's consistent policy that municipalities, not the State, should make their own decisions in the sale of sewer services.

(2) WIS. STAT. § 144.07 does not evidence a state policy to replace competition with regulation and does not direct the City to monopolize sewer services in unincorporated areas.

The only other statute relied upon by the lower courts is WIS. STAT. §144.07(1m), (See Appendix of Statutes). This statute has no application to this case because the statute does not apply unless the Wisconsin Department of Natural Resources (WDNR) orders the City to provide service in an unincorporated area. There

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waukee v. Public Service Commission, supra, 11 Wis.2d 111; see generally, Comment, *Role of Local Government In Water Law*, 1959 Wis. L. REV. 117, 121-22.

The Legislature modified the jurisdictional status by 1965 WIS. LAWS, C. 509, § 1, which amended WIS. STAT. § 66.069 (2) (c) to its present wording. This enactment deprived the PSCW of jurisdiction over service questions in unincorporated areas—"*Notwithstanding* s. *196.58(5).*" It also modified § 66.-069(2) (c) from a mandatory procedural statute—"shall by ordinance fix"—to a permissive grant of jurisdiction over service area issues—a city "may by ordinance fix" the limits of its service area, with such ordinance to "delineate" the area to be served and there being "no obligation to serve beyond" the area, unless the public utility obligation to serve had previously been fixed—"existed at the time the ordinance was adopted."

is no such order here. Clearly the City is not acting pursuant to this statute because the statute has no application to the facts of this case.

Even if the WDNR had acted under §144.07(1m), the statute does not contemplate the elimination of a competitor from the marketplace. The statute reflects the policy of the State of Wisconsin that it will not *compel* a city to serve unincorporated areas. This is in accordance with §66.069(2)(c), which leaves such questions to the local governing bodies. But the statute does not express any policy of the Wisconsin Legislature as to whether the City — acting on its own — may choose to sell services to certain persons in an unincorporated area, but not to a potential competitor of the City for other sales of sewage services. It simply does not address the question of whether, under what circumstances, or according to what criteria, a city acting of its own initiative may otherwise sell or not sell sewage services beyond its corporate limits. It thus further expresses the State's neutrality as to the competitive concerns at issue.

The Wisconsin statutory scheme firmly establishes that it was the City and the City alone which decided to offer its treatment services in the Towns, but not to the Towns. The City of Eau Claire, not the State of Wisconsin, decided to monopolize sewage collection and transportation services in the Towns. The City's actions do not necessarily follow from any expressed State policy. Therefore, the *Parker* exemption does not apply.

IV. If The First Prong Of The Parker Exemption Is Adopted As Set Forth In This Brief, Active State Supervision Is Not Required In All Cases. If The Seventh Circuit's Test Is Accepted, State Supervision Must Exist In All Cases.

The second prong of the *Parker* exemption requires that the policy to displace competition be "actively supervised" by the state. *Midcal,* 445 U.S. at 105. This is required to prevent a State from thwarting the Sherman Act "by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal,* 445 U.S. at 106. The purpose of the second prong of the *Parker* exemption is the same as the first — to assure that the anticompetitive conduct is the State's and not someone else's. Therefore the question of whether active State supervision is necessary depends in part upon what the requirements of the first prong of the *Parker* exemption are determined to be.[23]

If the "clearly articulated and affirmatively expressed" prong of the *Parker* exemption is applied as set forth in this brief, the need for active State supervision is greatly reduced. More importantly, the issue of the second prong of the exemption is not reached because the City has failed to meet the first prong of the test for exemption.

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[23]The Supreme Court expressly reserved decision on this issue in *City of Boulder, supra,* 455 U.S. 51, fn. 14. The position adopted by the Seventh Circuit was without support in existing case law at the time, and is contrary to that of the First Circuit, the only Court considering the issue prior to *Hallie, Corey v. Look,* 641 F.2d 32, 37 (1st Cir. 1981). Since *Hallie,* two circuits have adopted the Seventh Circuit's rule. *Gold Cross Ambulance & Tran. v. City of Kansas City,* 705 F.2d 1005, 1014-15 (8th Cir. 1983), *petition for cert. filed,* 52 U.S. L.W. 3039 (Aug. 9, 1983); *Golden State Transit Corp. v. City of Los Angeles,* 726 F.2d 1430, 1434 (9th Cir. 1984). The case relied upon by the Seventh Circuit, *Pueblo Aircraft Service v. City of Pueblo,* 679 F.2d 805 (10th Cir. 1982), *cert. den.,* — U.S. —, 103 S.Ct. 762 (1983), does not discuss the "active supervision" test.

If this Court requires a clearly articulated and affirmatively expressed State policy to displace competition, with the State directing or authorizing the nonsovereign to engage in anticompetitive conduct which necessarily follows from the State's policy, then active state supervision may not be required in all cases. The need for active state supervision will depend upon the nature of the anticompetitive activity. For example, in *Midcal,* the nonsovereigns were setting prices. Active State supervision was required to assure that the prices set were attributable to the State and not the nonsovereigns. Active State supervision would only be necessary in cases where it is required to assure the ultimate policymaker is the State and not the nonsovereign entity or entities. This rule would apply equally to private and public nonsovereigns.

If, however, the relaxed standard of the Seventh Circuit is utilized, the "active state supervision" test must be applied in all cases to assure the State as sovereign has made a decision to displace competition. By authorizing a municipality to act in an area, but leaving to local governments the decisionmaking authority as to *if,* when, how, under what circumstances or with what effects the authority is to be exercised, a State would satisfy the Seventh Circuit test—but leave the ultimate question of antitrust violations solely in the hands of local policymakers.

Under the Court of Appeals' test in *Hallie,* a State need only say, "Our municipalities may, if they wish, violate the Sherman Act in providing service X." If this satisfies the first prong of the *Parker* exemption, active State supervision must be required in all cases because

it would be the only real nexus between the State and the City's anticompetitive conduct.

The rationales offered for total elimination of the second prong of the test are unconvincing. First, the Court of Appeals argues:

> Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed *restraints* imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist. [J.A. 41-42 (Emphasis added, footnote omitted).]

This argument proves too much. It applies with equal force to *private* parties who must establish both the "clearly articulated" *and* "active supervision" tests to obtain *Parker* immunity.[24] Second, the *Hallie* court suggests application of *Midcal* would be "unwise" because:

> A requirement of active state supervision would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin. [J.A. 42]

The very purpose of the *Parker* test, particularly as explained in *Boulder,* is to ascertain that the decision to displace competition is not one of "local autonomy" but of the State as sovereign. Finally, the Court argues,

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[24]The Court of Appeals fails to identify the "restraints" imposed by Wisconsin in allowing the City to decide if it will monopolize.

> States would be required to supervise all local actions if municipalities are to avoid antitrust exposure, and courts would have to make the difficult determination of what "active" supervision is in terms of frequency and effectiveness. We doubt that the Court in *Midcal* intended that the states spend their limited resources actively supervising the traditional governmental functions of their municipalities so that they can avoid antitrust liability. [J.A. 42-43]

Such concerns are more theoretical than real; the concerns dissipate if the *Midcal* test is applied as suggested by the Towns.[25]

Adoption of such a requirement would not interfere with local government's traditional exercise of powers. It is only when the local body acts contrary to the antitrust law that a court need examine whether the State adequately supervised the activity. After all, local government is subject to the restraints of the Sherman Act. It is only when local government is carrying out the State's program that they are exempt. Requiring that the State supervise its own anticompetitive program is not an onerous requirement.

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[25]A final rationale, offered by the Eighth Circuit, does not withstand minimum scrutiny. The Eighth Circuit suggests that active supervision is unnecessary because municipal offiicals are elected. *Gold Cross, supra* note 23, 705 F.2d at 1014. Why the electors of a city—presumably the recipients of the economic benefits of antitrust violations by the city—would respond by voting out of office the engineers of those economic benefits is unexplained by the *Gold Cross* court. Compare *Century Federal v. City of Palo Alto, Cal.*, 579. F. Supp. 1553, 1559-60 (N.D. Cal. 1984).

V. The City's Actions Are Not Actively Supervised By The State Of Wisconsin.

If the "active state supervision" requirement is applied to the City, it is clear that Wisconsin takes no role in the City's actions. It is the decision of the City of Eau Claire to extend service to some but deny service to the Towns. Wisconsin does not review the City's decision, does not establish standards for the City to follow, does not intimate whether it agrees or disagrees with the local anticompetitive policy.

CONCLUSION

The judgment of the District Court and the Court of Appeals should be reversed and the case remanded to allow the Towns to prove their allegations.

Respectfully submitted this 26th day of July, 1984.

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APPENDIX OF STATUTES

15 U.S.C. Section 2

Sherman Act, § 2

§ 2 Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

WIS. STAT. § 66.069(2) (c) (1981)

Notwithstanding s. 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

WIS. STAT. §66.076(1) (1981)

In addition to all other methods provided by law any municipality may construct, acquire or lease, extend or improve any plant and equipment within or without its corporate limits for the collection, transportation, storage, treatment, and disposal of sewage, including the lateral, main and intercepting sewers necessary in connection therewith, and any town, village or city may arrange for such service to be furnished by a metropolitan sewerage district or joint sewerage system. . . .

WIS. STAT. §144.07(1m) (1981)

An order by the department for the connection of unincorporated territory to a city or village system or plant under this section shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under s. 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under s. 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum is denied under s. 66.024(2) or the referendum under s. 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective.

WIS. STAT. §196.58(5) (1981)

The commission shall ve original and concurrent jurisdiction with municipalities to require extensions of service and to regulate service of public utilities. Nothing in this section shall be construed as limiting the power of the commission toa act on its own motion to require extensions of service and to regulate the service of public utilities.